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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANDREW CALCATERRA, derivatively)	Case No. 15cv2722 BAS (NLS)
on behalf of BOFI HOLDING, INC.,)	
)	Plaintiffs Andrew Calcaterra, Zhang
Plaintiff,)	Yong, and Laborers Pension Trust
)	Fund of Northern Nevada's
vs.)	Memorandum of Points and
)	Authorities in Support of Motion to
GREGORY GARRABRANTS, <i>et al.</i> ,)	Consolidate Related Actions and to
)	Appoint Lead Counsel
Defendants,))	
)	Date: March 21, 2016
– and –)	Time: None
)	Judge: Hon. Cynthia A. Bashant
BOFI HOLDING, INC., a Delaware)	Courtroom: 4B (Schwartz)
corporation,)	
)	NO ORAL ARGUMENT UNLESS
Nominal Defendant.)	REQUESTED BY THE COURT

[Caption continues on following page.]

1 DAVID DEYOUNG, derivatively and)
2 on behalf of BOFI HOLDING, INC.,)

3 Plaintiff,))

4 vs.)

5)
6 GREGORY GARRABRANTS, *et al.*,)

7 Defendants,))

8 – and –)

9)
10 BOFI HOLDING, INC., a Delaware)
11 corporation,)

12 Nominal Defendant.)

13 ZHANG YONG, derivatively on behalf)
14 of BOFI HOLDING, INC.,)

15 Plaintiff,))

16 vs.)

17)
18 GREGORY GARRABRANTS, *et al.*,)

19 Defendants,))

20 – and –)

21)
22 BOFI HOLDING, INC., a Delaware)
23 corporation,)

24 Nominal Defendant.)

25 [Caption continues on following page.]

1 LABORERS PENSION TRUST FUND) Case No. 16cv0259 BTM (RBB)
2 OF NORTHERN NEVADA,)
3 derivatively on behalf of BOFI)
4 HOLDING, INC.,)
5)
6) Plaintiff,)
7)
8 vs.)
9)
10)
11 THEODORE C. ALLRICH, *et al.*,)
12)
13) Defendants,)
14)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)
26)
27)
28)
BOFI HOLDING, INC., a Delaware)
corporation,)
Nominal Defendant.)

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I. INTRODUCTION

This is a motion¹ to consolidate related actions under Rule 42(a) of Federal Rules of Civil Procedure and to appoint Bottini & Bottini, Inc. as lead counsel for plaintiffs in the consolidated actions.

Pending in this District are four shareholder derivative actions brought on behalf of nominal defendant BofI Holdings, Inc. (“BofI” or the “Company”), a San Diego, California-based holding company for BofI Federal Bank:

- *Calcaterra v. Garraabrants*, No. 15cv2722 BAS (NLS), filed on December 3, 2015 and assigned to this Court;
- *DeYoung v. Garraabrants*, No. 16cv0163 BAS (NLS), filed on January 22, 2016 and assigned to this Court;
- *Yong v. Garraabrants*, No. 16cv0241 BEN (WVG), filed on January 29, 2016 and assigned to the Honorable Roger T. Benitez; and
- *Laborers Pension Trust Fund of Northern Nevada v. Allrich*, No. 16cv0259 BTM (RBB), filed on February 2, 2016 and assigned to the Honorable Barry T. Moskowitz.

These derivative actions involve common issues of law and fact because each alleges breach of fiduciary duties and other derivative claims arising from the individual defendants’ false and misleading statements and omissions regarding BofI’s internal controls, compliance with regulatory requirements, and the Company’s current and future prospects for revenue and earnings growth. Plaintiffs Andrew Calcaterra, Zhang Yong, and Laborers Pension Trust Fund of Northern Nevada (collectively, “Plaintiffs”) therefore jointly request that the actions be consolidated for all purposes and trial under Rule 42(a) of the Federal Rules of Civil Procedure.

To ensure orderly, efficient proceedings in the consolidated action, Plaintiffs also jointly request that the Court appoint Bottini & Bottini, Inc. as Plaintiffs’ lead counsel in

¹ This motion is brought on behalf of three of the four plaintiffs who have filed related cases — Plaintiffs Calcaterra, Yong and Laborers.

1 the consolidated action. A San Diego, California-based law firm specializing in securities
2 litigation, Bottini & Bottini has substantial experience in, and a successful track record of,
3 litigating shareholder derivative actions. Bottini & Bottini also has experience working
4 side-by-side with counsel for plaintiffs Yong and Laborers in shareholder litigation.
5 Appointment of Bottini & Bottini as lead counsel will promote efficiency and conserve
6 the parties' resources.

7 Accordingly, the Court should grant Plaintiffs' motion in its entirety.

8 **II. OVERVIEW OF THE LITIGATION**

9 These pending actions are shareholder derivative actions on behalf of nominal
10 defendant BofI against certain of its directors and top officers for breach of fiduciary
11 duty, corporate waste, unjust enrichment and related relief.² Declaration of Francis A.
12 Bottini, Jr. ("Bottini Decl.") Exs. A–D.

13 BofI is the holding company for BofI Federal Bank, a diversified financial services
14 company that provides consumer and business banking products primarily through its
15 branchless, low-cost distribution channels. While under the stewardship of the individual
16 defendants,³ the Company issued false and misleading statements designed to artificially
17 inflate the trading price of BofI's shares and its market capitalization. More specifically,
18 between at least September 4, 2013 and October 13, 2015, the individual defendants
19 caused BofI to make false and/or misleading statements and/or fail to disclose material
20 adverse facts about the Company's business, operations, prospects and performance. For
21 example, the individual defendants caused BofI to misrepresent and/or fail to disclose

22 ² The first-filed *Calcaterra* complaint alleges four claims: (1) breach of fiduciary
23 duty; (2) abuse of control; (3) unjust enrichment; and (4) breach of the duty of honest
24 services. The *DeYoung* complaint alleges all four claims, as well as a claim for gross
25 mismanagement. The *Yong* complaint alleges the first three claims and omits the fourth
claim. The *Laborers* complaint alleges the first claim and third claim, as well as a claim
for abuse of control.

26 ³ The individual defendants are 13 officers and directors of BofI, including
27 Theodore C. Allrich, James S. Argalas, Eshel Bar-Adon, John Gary Burke, James J.
28 Court, Uzair Dada, Gregory Garrabrants, Paul J. Grinberg, Andrew J. Micheletti,
Nicholas A. Mosich, Edward J. Ratinoff, John C. Tolla and Derrick K. Walsh.
Defendant Walsh is named only in the *Laborers* complaint.

1 that: (1) BofI's internal controls were frequently disregarded; (2) BofI's borrowers
2 included foreign nationals who should have been off-limits under federal anti-money-
3 laundering laws; (3) many BofI accounts lacked required tax identification numbers; (4) in
4 violation of the anti-retaliation laws contained in the Sarbanes-Oxley Act of 2002 (the
5 "Sarbanes-Oxley Act" or "SOX") and the Dodd-Frank Wall Street Reform and
6 Consumer Protection Act (the "Dodd-Frank Act"), the BofI Board of Directors
7 ("Board") caused the Company to fire an internal auditor who raised the foregoing issues
8 with senior management and federal regulators after claiming status as a federally-
9 protected whistleblower; and (5) as a result of the above, the Company's statements
10 regarding BofI's internal controls and other financial statements were materially false and
11 misleading at all relevant times. Bottini Decl., Exs. A–D.

12 Propelled by these false statements, the trading price of BofI shares soared to over
13 \$142.00 per share. While BofI's shares traded at artificially inflated prices, Defendants
14 Allrich, Burke, Court, Grinberg, Micheletti and Ratnoff collectively sold 84,063 shares of
15 BofI stock based on insider information, receiving proceeds of more than \$8.2 million.
16 Bottini Decl., Exs. A–D.

17 The individual defendants' scheme continued unabated until mid-October 2015.
18 Then, on October 13, 2015, *The New York Times* published an article reporting that a
19 former internal auditor at BofI had filed a lawsuit against the Company under the federal
20 whistleblower laws. More specifically, *The New York Times* reported that the auditor's
21 complaint alleged, among other things, that: (1) BofI's borrowers included foreign
22 nationals who should have been off-limits under federal anti-money-laundering laws;
23 (2) the auditor had seen a spreadsheet that contained as many as 200 accounts without
24 tax identification numbers, contrary to BofI's representations to the Office of the
25 Comptroller of the Currency, its primary regulator; (3) BofI at times failed to provide full
26 and timely information to regulators; and (4) BofI wrongfully terminated the auditor after
27 he revealed wrongdoing at BofI to management and federal regulators. Bottini Decl.,
28 Exs. A–D.

1 On this news, the trading price of BofI shares collapsed, falling \$42.87 per share,
2 or 30%, to \$99.13 per share, instantly wiping out more than \$674 million in market
3 capitalization. Worse yet, the Company has been named as a primary defendant in a
4 costly and expensive-to-defend class action lawsuit brought by BofI shareholders for
5 alleged violations of the federal securities laws. Bottini Decl., Exs. A–D.

6 Nevertheless, the Board has not taken any legal action against the directors and
7 officers responsible for this debacle. Nor will they, because each of the individual
8 defendants is interested in the outcome of any such legal action. Accordingly, by this
9 action, plaintiffs seek to vindicate BofI’s interests against its wayward fiduciaries.

10 **III. ARGUMENT**

11 **A. Consolidation of the Related Actions Is Proper**

12 The power to consolidate related actions falls within the broad inherent authority
13 of every court “to control the disposition of the causes on its docket with economy of
14 time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S.
15 248, 254 (1936). The Court has discretion to consolidate related cases that involve
16 common questions of fact and law under Rule 42(a). FED. R. CIV. P. 42(a).⁴

17 Presently pending in this District are four related shareholder derivative actions —
18 *Calcaterra*, *DeYoung*, *Yong*, and *Laborers* — each alleging that Defendants breached
19 fiduciary duties owed to BofI. The four related *BofI* derivative actions arise from the
20 same events and transactions and assert substantially the same claims against the same
21 defendants. Thus, these actions raise common issues of law and fact. Because common
22 questions of law and fact predominate, consolidation of these actions, as well as any
23 subsequently-filed similar actions, is appropriate under Rule 42(a). *Schrivver v. Impac Mortg.*

24
25 ⁴ Rule 42(a) provides, in relevant part:

26 If actions before the court involve a common question of law or fact, the
27 court may: (1) join for hearing or trial any or all matters at issue in the
actions; (2) consolidate the actions; or (3) issue any other orders to avoid
unnecessary cost or delay.

28 FED. R. CIV. P. 42(a).

1 *Holdings, Inc.*, Nos. SACV 06-0031 CJC (RNBx) *et al.*, 2006 U.S. Dist. LEXIS 40607, at *6
2 (C.D. Cal. May 1, 2006) (consolidating related shareholder derivative actions).

3 Consolidation of similar shareholder actions also promotes judicial efficiency by
4 helping to alleviate duplication of time, effort and expense on the part of the Court and
5 litigants. “[W]hen consolidation is appropriate, the Court has the discretion to order the
6 consolidation of subsequently-filed or transferred cases that allege similar facts as those
7 alleged in the current shareholder derivative suits.” *Horn v. Raines*, 227 F.R.D. 1, 2
8 (D.D.C. 2005) (consolidating derivative actions); *see also Millman v. Brinkley*, Nos. 03-cv-
9 3831 WSD *et al.*, 2004 U.S. Dist. LEXIS 20113, at *7 (N.D. Ga. Oct. 1, 2004)
10 (consolidating derivative actions to conserve the parties’ resources).

11 Because the interests of all parties and the Court system are best served by the
12 efficiency, consistency, and economy achieved through the requested consolidation, the
13 related BofI shareholder derivative actions should be consolidated under Rule 42(a).

14 **B. Bottini & Bottini, Inc. Should Be Appointed Lead Counsel**

15 Appointment of lead counsel in consolidated actions is particularly warranted
16 because it permits efficient utilization of the Court’s and parties’ resources and helps
17 eliminate any duplication. *See, e.g., MacAlister v. Guterma*, 263 F.2d 65, 69 (2d Cir. 1958)
18 (“The benefits achieved by consolidation and the appointment of general counsel, i.e.
19 elimination of duplication and repetition and in effect the creation of a coordinator of
20 diffuse plaintiffs through whom motions and discovery proceedings will be channeled,
21 will most certainly redound to the benefit of all parties to the litigation.”); *Dollens v. Zions*,
22 Nos. 01 C 5931 *et al.*, 2001 U.S. Dist. LEXIS 19966, at *6 (N.D. Ill. Dec. 4, 2001)
23 (granting plaintiffs’ motion to consolidate and appointing co-lead plaintiffs as well as co-
24 lead and liaison counsel). As held in *MacAlister* and *Dollens*, the decision to establish a
25 leadership structure is within the broad discretion of the trial court. *See also* MANUAL FOR
26 COMPLEX LITIGATION (FOURTH) § 10.22 (2014).

27 Here, counsel for Plaintiffs Calcaterra, Yong, and Laborers have agreed that
28 Bottini & Bottini, whose lawyers filed the first action on behalf of plaintiff Calcaterra,

1 should be appointed as lead counsel for plaintiffs in the consolidated action. Based in
2 San Diego, California, Bottini & Bottini has substantial experience litigating shareholder
3 derivative actions and has a demonstrated record of success. Mr. Bottini, the firm's
4 founder, has served as lead or co-lead counsel in numerous shareholder derivative actions
5 in state and federal courts throughout the United States, including *Cook v. McCullough*,
6 No. 11 C 9119 (N.D. Ill.) (Career Education Corporation), *In re SunPower Corp. Shareholder*
7 *Derivative Litigation*, Master File No. C-09-5731 (N.D. Cal.), *Klein v. Cook*, No. 14-cv-3634
8 EJD (N.D. Cal.) (Apple Inc.), *In re Pacific Capital Bancorp Derivative Litigation*, No.
9 CIVRS1340306 (Cal. Super. Ct., Cnty. of Santa Barbara), *In re First Solar Derivative*
10 *Litigation*, No. CV-12-0769-PHX-DGC (D. Ariz.), and *In re Dell, Inc. Derivative Litigation*,
11 No. 06-cv-0839 (W.D. Tex.). See Bottini Decl. ¶ 7.

12 For example, in *In re Brocade Communications Systems, Inc.*, No. 05-cv-2233 (N.D.
13 Cal.), Mr. Bottini was retained as co-counsel to Brocade Communications Systems, Inc.
14 by the Special Litigation Committee of Brocade's board of directors to help litigate
15 Brocade's claims against its former officers and directors. After litigation of the case for
16 over five years, over \$24 million was recovered for Brocade through the litigation.

17 In another shareholder derivative litigation involving Career Education
18 Corporation in 2012, Bottini & Bottini successfully defeated defendants' motion to
19 dismiss the complaint challenging the sufficiency of the demand-futility allegations. See
20 *Cook v. McCullough*, No. 11 C 9119, 2012 U.S. Dist. LEXIS 114621 (N.D. Ill. August 13,
21 2012). Bottini & Bottini eventually secured a \$20 million recovery for Career Education,
22 in addition to the valuable corporate governance reforms. See Bottini Decl. ¶ 10, Ex. E at
23 255.

24 More recently in this District, Bottini & Bottini, working with other counsel,
25 helped secure the settlement of a multi-venue, two-year-long shareholder derivative
26 litigation involving the San Diego, California-based Maxwell Technologies, Inc. See *In re*
27 *Maxwell Technologies, Inc. Derivative Litigation*, No. 12cv0966 BEN (RBB) (S.D. Cal.).
28

1 In addition to Bottini & Bottini's experience and successful track record, the firm
2 is able and willing to commit the resources necessary to vigorously prosecute the claims
3 asserted in this litigation. *See* Bottini Decl. ¶ 11. Moreover, Bottini & Bottini has met
4 and conferred with counsel for plaintiff Laborers Pension Trust Fund, Robbins Geller
5 Rudman & Dowd LLP, and counsel for plaintiff Yong, The Shuman Law Firm, to
6 establish a protocol to ensure efficiency in assigning tasks among Plaintiffs' counsel. *See*
7 Bottini Decl. ¶ 12.

8 Notably, Bottini & Bottini has extensive experience in working side-by-side with
9 both Robbins Geller and The Shuman Law Firm. *See id.* For example, Mr. Bottini's firm
10 has served as co-counsel with Robbins Geller in numerous securities cases, including
11 *Robinson v. Audience, Inc.*, No. 1:12-cv-232227 (Cal. Super. Ct., Cnty. of Santa Clara),
12 *Mogenson v. Body Central Corp.*, No. 12-cv-0954-HES-JRK (M.D. Fla.), *Plymouth County*
13 *Retirement System v. Model N, Inc.*, No. CIV530291 (Cal. Super. Ct., Cnty. of San Mateo),
14 and *Wiley v. Envivio, Inc.*, No. CIV517185 (Cal. Super. Ct., Cnty. of San Mateo). *See*
15 Bottini Decl. ¶ 13. In addition, Bottini & Bottini and Robbins Geller are currently
16 working together to prosecute a shareholder derivative action on behalf of Lumber
17 Liquidators Holdings, Inc. pending in the Eastern District of Virginia. *Id.* Mr. Bottini's
18 firm also served as co-lead counsel with The Shuman Law Firm in several shareholder
19 derivative cases, including *In re American Capital, Ltd. Derivative Litigation*, No. 11-cv-2424-
20 PJM (D. Md.), and *In re OSI Systems, Inc. Derivative Litigation*, No. 14-cv-2910 MWF
21 (VBKx). *See* Bottini Decl. ¶ 14.

22 In sum, Bottini & Bottini possesses the resources, skills, records of results and
23 willingness to aggressively litigate shareholder cases to trial. Therefore, plaintiffs
24 Calcaterra, Yong, and Laborers respectfully request that the Court appoint Bottini &
25 Bottini as lead counsel for plaintiffs in the consolidated action.

26 ///

27 ///

28 ///

1 **IV. CONCLUSION**

2 For all the foregoing reasons, Plaintiffs' Motion to Consolidate Related Actions
3 and to Appoint Lead Counsel should be granted. The Court should issue the
4 accompanying proposed order consolidating *Calcaterra, DeYoung, Yong, and Laborers* for all
5 purposes and appointing Bottini & Bottini, Inc. as lead counsel for plaintiffs in the
6 consolidated action.

7 Dated: February 19, 2016

Respectfully submitted,

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Signature Certification

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I hereby certify that the content of this document is acceptable to Travis E. Downs III and Kip B. Shuman, and that I have obtained Mr. Downs' and Mr. Shuman's authorizations to affix their electronic signatures to this document.

s/ Francis A. Bottini, Jr.
Francis A. Bottini, Jr.